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No. 94-413

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., APERTURE FOUNDATION, INC., FREEDOM TO READ FOUNDATION, MAGAZINE PUBLISHERS OF AMERICA, AMERICAN CIVIL LIBERTIES UNION, AND LAW & HUMANITIES INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities iii

Brief in Support of Petitioners 2

Statement 2
The *Amici* 2
Interest of the *Amici* and Reasons for Granting the Writ 4
Summary of Argument 5

ARGUMENT 8

I. BOTH THE STATUTORY LANGUAGE AND CONGRESS' INTENT REQUIRE NUDITY. ACCORDINGLY A DEPICTION OF FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA UNDER 18 U.S.C. §2256(2)(E) 8

A. The Plain Language of the Statute Excludes Liability for a "Lascivious Exhibition" When Clothing Conceals the Body Parts Named in the Statute 8

B. The Statute's Legislative History Confirms that Nudity is a Minimum Requirement for a "Lascivious Exhibition of the Genitals or Pubic Area" 10

C. Congress' Intent is Presumptively Consistent With the Child Pornography Laws of the Fifty States 13

TABLE OF CONTENTS - Continued

Page

II. WERE THIS COURT TO AFFIRM THE THIRD CIRCUIT'S "EXPANSIVE" READING, IT WOULD CREATE PROBLEMS OF CONSTITUTIONAL DIMENSIONS 14

A. Criminalizing Non-nude Depictions Unconstitutionally Expands the Definition of Child Pornography Beyond That Authorized by *Ferber* 14

B. As Defined by the Third Circuit, 18 U.S.C. §2256 is Vague, Overbroad and Could Criminalize Legitimate Materials 17

1. The Third Circuit's Decision Creates the Risk of Real and Substantial Overbreadth 17

2. The Court's Erroneous Interpretation is Impermissibly Vague 19

Conclusion 20

TABLE OF AUTHORITIES

Cases: **Page**

Blanchette v. Connecticut. Gen. Ins. Corps., 419 U.S. 102 (1974) 11

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 17

Massachusetts v. Oakes, 491 U.S. 576 (1989) 18

Miller v. California, 413 U.S. 15 (1973) 15

Moskal v. United States, 498 U.S. 103 (1990) 8, 10

NAACP v. Button, 371 U.S. 415 (1963) 19

New York v. Ferber, 458 U.S. 747 (1982) 7, 14, 15

Osborne v. Ohio, 495 U.S. 103 (1990) 18

People v. Walcher, 162 Ill. App. 3d 455, 515 N.E.2d 319 (4th Dist. 1987) 13

People v. Wallace, 11 Cal. App. 4th 568, 14 Cal. Rptr. 2d 67 (5th Dist. 1992) 14

Regina v. Hicklin, L.R., 3 Q.B. 360 (1868) 16

Roth v. United States, 354 U.S. 476 (1957) 16

State v. Petrone, 468 N.W.2d 676 (Wis. 1991), *cert. denied*, 112 S.Ct. 339 (1991) 14

Sullivan v. Finkelstein, 496 U.S. 617 (1990) 11

United States v. Knox, 977 F.2d 815 (3rd Cir. 1992), *cert. granted*, 113 S.Ct. 2926 (1993), *vacated and remanded*, 114 S. Ct.

TABLE OF AUTHORITIES - Continued

Page

375 (1993), *opinion on remand*, PA 1 ..... *passim*

United States v. One Book Called "Ulysses", 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934) 16

United States v. R.L.C., 112 S. Ct. 1329 (1992) 10

Statutes:

18 U.S.C. § 2252(a)(2) and (4) ..... 5ff.

18 U.S.C. § 2256 ..... *passim*

18 U.S.C. § 2256(2)(E) ..... *passim*

18 U.S.C. § 2256(2)(A)-(E) 10

Miscellaneous:

A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. of the Judiciary, 97th Cong., 2d Sess. 111 (1982) 12

Child Protection Act of 1984, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492 12

Child Sexual Abuse and Pornography Act of 1986, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952 12

123 Cong. Rec. 17227 (June 1, 1977) 12

TABLE OF AUTHORITIES - Continued

Page

139 Cong. Rec. S14976 (Daily ed., Nov. 4, 1993) 10

Dorland's Illustrated Medical Dictionary 686 (27th ed. 1988) 9

Hearings on S.2856 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary, 97th Cong., 2d Sess. 111 (1982) 12-13

Protection of Children Against Sexual Exploitation Act of 1977, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40 12

S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40 ..... 11, 12

2A Norman Singer, *Sutherland on Statutory Construction* §§ 47.16, 47.17 (5th ed. 1992) 10

The Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970) 17

Webster's II, New Riverside University Dictionary 452 (1984) 9

Webster's Ninth New Collegiate Dictionary 8

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STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the National Association of Artists' Organizations, the Periodical and Book Association of America, Inc., Aperture Foundation, Inc., the Freedom to Read Foundation, the Magazine Publishers of America, the American Civil Liberties Union and the Law & Humanities Institute submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both Petitioner and Respondent, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and to educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and to protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 330 independent local wholesale distributors who distribute over 95% of all magazines in every state of the United States, as well as comic books, paperback books and newspapers.

The National Association of Artists' Organizations ("Artists' Organizations") is a not-for-profit, membership service organization dedicated to serving and promoting non-profit organizations engaged in the presentation and support of new and contemporary work on the visual, performing, literary, media, and interdisciplinary arts. Artists' Organizations' members constitute the primary presenters, supporters and makers of new and evolving art in America.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who

distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

Aperture Foundation, Inc. ("Aperture"), a not-for-profit corporation, was founded over forty years ago by Ansel Adams, Dorothea Lange, Minor White and others to foster the fine art of photography. Aperture is dedicated to the presentation of distinguished historical and contemporary photography and to the study of new photographic media, through publishing, exhibitions, research, education and preservation.

The Freedom to Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Magazine Publishers of America ("MPA") is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, dedicated to the protection and promotion of individual rights and liberties, primary among them the freedom of speech. Most of the ACLU's members are purchasers, readers, and viewers of books, magazines and films. In 1991, the ACLU established an Arts Censorship Project specifically to combat increasing threats of censorship in the United States, including often overzealous enforcement of laws relating to information or creative expression about human sexuality.

The Law & Humanities Institute ("LHI") is a worldwide, not-for-profit organization consisting of scholars, writers, lawyers, literary critics and other creative persons who seek to strengthen the relations between law and the humanities. LHI monitors and opposes developments in the law that threaten freedom of expression of creative artists, other humanists and their creative imagination.

INTEREST OF THE *AMICI* AND REASONS FOR GRANTING THE WRIT

Aperture Foundation and members of the *amici* other than the FTR, ACLU and LHI publish, produce, distribute and sell books, magazines, videos, works of art and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. *Amici's* members do not own what are commonly referred to as adult retail stores; nor do they distribute the adult materials that are generally found in such stores. *Amici's* members do, however, create, distribute and sell mainstream materials that may include photographs or depictions of clothed teenagers and younger children in poses that may, in light of the Third Circuit's expansive holding, be considered lascivious exhibitions. The ACLU's and LHI's members are readers, viewers and acquirers of such material. Libraries and librarians represented by FTR provide such materials to readers and viewers. Because *amici's* members include artists, distributors, booksellers and librarians who create, distribute, sell and loan popular and potentially provocative books, periodicals and art, and the persons who purchase them, *amici* have a significant interest in the resolution of the issue before the Court.

Sexual exploitation of children is properly denounced. Thus, violations of 18 U.S.C. § 2256(2)(E) carry with them enormous social stigma and censure. Congress drafted the statute narrowly for this reason. Prior to the rulings of the Third Circuit, *amici's* members, in their attempts to comply with that statute, could obtain guidance from the universal requirement of nudity in determining whether a "lascivious exhibition of the genitals or pubic area" had occurred. Interpreting 18 U.S.C. § 2256(2)(E) to include fully clothed depictions of the genitals or pubic area as lascivious

exhibitions, however, removes that clear standard. This raises the specter that *amici's* members could unwittingly suffer the punishment and censure associated with violation of the statute. Under the sweeping and novel construction of the court below, even if the material does not include nudity or sexual conduct, a publisher, distributor or retailer must speculate whether such depictions could possibly appeal to the lascivious interest of a pedophile -- an inherently impossible determination and a constitutionally unacceptable burden.

On June 7, 1993, this Court granted a writ of certiorari from the first decision of the Third Circuit in this case (*Knox v. U.S.*, 977 F.2d 815 (3d Cir. 1992) ("*Knox I*")) to decide whether there can be an exhibition of the genitals or pubic area under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing. 113 S.Ct. 2926 (1993). After grant of the writ, the United States Government changed its prior position on this question, which altered position adopted part of petitioner's argument. This Court then remanded the case to the Third Circuit for reconsideration in light of the position taken by the Solicitor General. 114 S.Ct. 375 (1993). After such reconsideration, the Third Circuit rejected the reading of the statute proposed by the United States and reaffirmed its prior interpretation set forth in *Knox I*. PA 1 ("Knox II"). The same reasons which caused this Court to grant certiorari in 1993 are still present. The Third Circuit merely tidied up some of the language in its opinion, while reaching the same result. The error of and danger from the Third Circuit's expansive interpretation remains. The Court should grant certiorari again and correct this significant error.

SUMMARY OF ARGUMENT

The issue before the Court is one of statutory construction: whether photographic images of clothed minors engaged in no sexual activity can be the basis of criminal convictions under 18 U.S.C. § 2252(a)(2) and (4). Traditional principles of statutory construction, the legislative history of the statute and judicial

precedent confirm that clothed images do not constitute a "lascivious exhibition of the genitals or pubic area."

In both of its decisions, the Third Circuit held that petitioner Stephen A. Knox violated 18 U.S.C. § 2252(a)(2) and (4) by possessing three videotapes purportedly depicting lascivious exhibitions of the genitals or pubic area of minors, although it is undisputed that none of the tapes contained nudity. The Third Circuit conceded in *Knox I* that its holding applied an expansive definition of the statutory requirement of a "lascivious exhibition of the genitals or the pubic area." Under that holding, reaffirmed in *Knox II*, such an "exhibition of the genitals or pubic area" occurs even when the genitals or pubic area are fully clothed and those body parts cannot be seen.

The Third Circuit's decision is based on an erroneous interpretation of the statute and its legislative history. Non-nude depictions are not "exhibitions" of the genitals or pubic area. Therefore, they simply are not "sexually explicit conduct" within the meaning of the statute. Even the United States concedes that nudity, or at a minimum, a visible depiction of the genitals or pubic area, must be present to have an "exhibition" under 18 U.S.C. § 2256(2)(E). *See* Brief for the United States on Remand to the Third Circuit 11 ("USBr Rem").

In *Knox II*, the Third Circuit analyzes "lascivious exhibition," emphasizing the subjective aspect of lasciviousness, while failing to acknowledge the objective statutory requirement of an exhibition of "the genitals or pubic area" -- which requires nudity. The Third Circuit's holding criminalizes any material depicting a minor which appeals to the lascivious interest of the intended audience. However, the statute does not -- and constitutionally cannot -- criminalize expression containing only lawful images of minors because the expression encourages sexual thoughts. Thus, the only images of minors that are prohibited by the statute are those involving actual sexual conduct (not at issue here) or "lascivious exhibition of the genitals or pubic area" -- which, at a minimum,

requires a nude depiction, and which is absent from the material at issue here.

Relying on a misunderstanding of the legislative history, the Third Circuit erroneously held that the statute does not require nudity and that therefore fully-clothed genitals or pubic areas can be deemed lascivious. The criminalization of fully-clothed depictions also ignores the leading case on this subject, *New York v. Ferber*, 458 U.S. 747 (1982). Even if Congress had meant to include photographs of clothed children not involved in sexual conduct within the definition of child pornography, such a definition would be beyond the scope of material permitted by *Ferber* to be regulated or banned.

Permitting punishment for non-nude depictions raises serious practical and constitutional concerns and the risk of ruinous prosecutions for the mainstream *amici*. Eliminating nudity as a requirement for a finding of a "lascivious exhibition of the genitals or pubic area" would expand significantly the range of materials -- books of art photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, catalogues and even family pictures -- it would be criminal to produce, sell or possess since they could be deemed "lascivious." The subjective standard adopted by the Third Circuit would severely chill mainstream businesspersons engaged in the creation, distribution and sale of visual images; they would have to apply an imprecise, subjective test to every item they produced or sold involving depictions of clothed minors.

ARGUMENT

I. BOTH THE STATUTORY LANGUAGE AND CONGRESS' INTENT REQUIRE NUDITY. ACCORDINGLY A DEPICTION OF FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA UNDER 18 U.S.C. § 2256(2)(E).

A. The Plain Language of the Statute Excludes Liability for a "Lascivious Exhibition" When Clothing Conceals the Body Parts Named in the Statute.

Congress' unequivocal intent in enacting 18 U.S.C. § 2256(2)(E) was to prohibit only exhibitions that both (1) depicted genital or pubic nudity and (2) were lascivious. A review of the statutory language and the statute's legislative history reveals that Congress did not intend to criminalize depictions in which the genitals or pubic area are completely clothed and thereby concealed from view.

The language of the statute and its "ordinary" meaning is the first line of inquiry in determining a statute's scope. *Moskal v. United States*, 498 U.S. 103, 108 (1990). Here, the statutory language itself evinces Congress' requirement that, to be considered child pornography, a lascivious exhibition must involve, at a minimum, a nude depiction of the genitals or pubic area.

The Third Circuit misdirected its inquiry when it searched for the meaning of "lascivious exhibition." *Knox II* at PA 24; *Knox I* at 820. There is no real question what "exhibition" means: as the Third Circuit acknowledged, it means "display" or "show." (PA 25-26). "Exhibition," "display" and "showing" all require "present[ation] to *view*," "presentation . . . in open *view*," "caus[ing] or permit[ting] to be *seen*." *Webster's Ninth New Collegiate Dictionary* (1984) (definitions of "exhibition," "display" and

"show") (emphasis added); *see Webster's II, New Riverside University Dictionary* 452 (1984) [hereinafter *Webster's II*] (defining "exhibit" as "[t]o show externally, . . . [t]o present for public view"). It would be a strange art "exhibition" if all the pictures were hidden by cloth covers. There can be no question in this case, as in all cases involving a visual image, that *something* was "exhibited" --*i.e.*, made visible -- in the videotapes. However, the dispositive inquiry is whether what was exhibited was the "genitals or pubic area,"[1] as the statute requires, and whether such an exhibition was "lascivious."

The Third Circuit properly rejected the district court's "novel" interpretation of the term "pubic area," properly referred to the rule of lenity, and properly indicated that the term should be confined to its "medically accepted meaning."[2] *Id.* To the contrary, as the court below acknowledged, "the genitalia and pubic areas of the young girls [in the videotapes] were always *concealed* by an abbreviated article of clothing." *Knox I* at 817 (emphasis added). It was the *clothing* covering the genitals and pubic area that was "show[n] externally," *Webster's II* at 452, and thus only the *clothing* was "exhibited." That which is "always concealed" is, by definition, *not* "displayed."

In addition, the Third Circuit's broad interpretation makes no sense within the context of the statute as a whole. The statute lists "lascivious exhibition of the genitals or pubic area" as one of five examples of proscribed "sexually *explicit* conduct," along with

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[1] The legal definition" of "genitals" and "pubic area" presumptively should be consistent with their "standard medical definition[s]." *Knox I* at 819. It hardly requires a dictionary to know that "genitals" are "the various external and internal organs concerned with reproduction." *Dorland's Illustrated Medical Dictionary* 686 (27th ed. 1988). Plainly, in medical terminology, neither the "genitals" nor the "pubic area" encompass the clothing that covers them.

[2] Indeed, the trial court below understood that the object on "exhibition" must be revealed -- and not concealed by clothing -- when it strained to include the "uppermost portion of the inner thigh" as part of the "pubic area," which is required by the statute to be lasciviously exhibited, in order to rationalize upholding Mr. Knox' indictment. *Knox I* at 818.

actual or simulated sexual intercourse, bestiality, masturbation and sadistic or masochistic abuse. 18 U.S.C. § 2256(2)(A)-(E) (emphasis added). The "lascivious exhibition" category can only be interpreted properly in the context in which it was drafted: as one type of sexually "explicit" conduct. *See* 2A Norman Singer, *Sutherland on Statutory Construction* §§ 47.16, 47.17 (5th ed. 1992). Non-nude depictions alone are not "sexually explicit conduct" and fall outside the rubric of sexually-explicit materials prohibited by the statute.

B. The Statute's Legislative History Confirms that Nudity is a Minimum Requirement for a "Lascivious Exhibition of the Genitals or Pubic Area."

Congress' intent to criminalize depictions containing, at a minimum, nudity and lascivious behavior is confirmed by the statute's legislative history. See *United States v. R.L.C.*, 112 S. Ct. 1329, 1334 (1992); *Moskal v. United States*, 498 U.S. 103, 110 (1990). In enacting the statute, Congress specifically addressed and rejected as overbroad standards virtually identical to the one adopted by the Third Circuit. Indeed, not only did Congress make clear that nudity is a requirement, it also made clear that nudity alone is insufficient.[3] Something more, namely a "lascivious exhibition of the genitals and pubic area," is required.

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[3] The recent "Confirmation of Intent of Congress" is inadmissible as legislative history and is irrelevant. On November 4, 1993, the Senate unanimously adopted, as an amendment to an unrelated bill, a "confirmation of intent of Congress," stating it is Congress' intent that § 2256(2)(E) "is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernible through clothing." 139 Cong. Rec. S14976 (Daily ed., Nov. 4, 1993). This amendment, as well as the positions expressed by the *amici* members of Congress before the Third Circuit, amount to nothing more than attempts retroactively to create legislative history contrary to the actual contemporaneous legislative history. "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage.

(Continued on next page)

The legislative history of 18 U.S.C. § 2256(2)(E) demonstrates that Congress did not intend to include non-nude depictions within the scope of the statute. S. 1011 (the "Roth bill"), the original legislative proposal that led to enactment of 18 U.S.C. §§ 2251-2257 in 1977, prohibited "[n]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 60 [hereinafter S. Rep. No. 95-438]. Congress specifically rejected that nudity standard because it was overly broad. The Senate report recommending passage of the revised bill, which deleted the nudity standard, warned that the deleted nudity standard was "so broad that it could conceivably prohibit such innocent scenes as 'skinny dipping' or even nude snapshots of babies that were mailed to grandparents." *Id.* at 49. Congressman Edward I. Koch said he would not endorse the nudity standard because he was "*concerned*

(Contined from preceding page)

[citation omitted]. Such statements represent only the personal views of these legislators, since the statements were [made] after passage of the Act." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974) (citation omitted).

> Subsequent legislative history — which presumably means the *post*-enactment history of a statute's consideration and enactment— is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means.... Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring) (emphasis added).

Post-enactment statements are even less trustworthy guides to legislative intent when they are made, as here, seventeen years after the enactment in question, and by legislators the majority of whom had no role in the original enactment. The definitional language reflecting the nudity requirement was enacted in 1977 and has not been changed since. More than half of the Senators who signed the "confirmation of intent of Congress" were not Members of the Congress when the bill was adopted in 1977.

about the breadth of [that] term[]." 123 Cong. Rec. 17227 (June 1, 1977) (emphasis added). The Committee on the Judiciary, reporting on the bill, recommended that Congress reject the original bill based in part on the Justice Department's conclusion that "there was a very strong possibility that the courts would declare this section unconstitutional on its face." S. Rep. No. 95-438 at 49.

The Congressional debate focused on which subset of nude depictions fell within the statute's reach. For example, then Assistant Attorney General Patricia M. Wald, in a letter to the Chair of the Judiciary Committee, proposed that the language, subsequently adopted, requiring "lewd [now, lascivious] exhibitions of the genitals" be substituted for "nudity." S. Rep. No. 95-438 at 63 (letter from Assistant Attorney General Wald to Senator James O. Eastland). The new language was intended to "make clear in the legislative history of the bill what types of *nude* portrayals of children were intended to be encompassed within the statutory definition." *Id.* (emphasis added). *The extensive debates throughout the statute's history do not include a single reference to criminalizing non-nude depictions.*[4] The statute cannot properly be read to criminalize non-nude depictions when Congress never considered such an application.

Even the prosecutors who testified before Congress as it considered amendments to the statute understood 18 U.S.C. § 2256(2)(E) to require nudity *plus* lewdness or lasciviousness. Robert Pitler, Bureau Chief of New York's District Attorney's Appeals Bureau, testified that "lewd exhibition of the genitals . . . means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display." *Hearings on S. 2856 Before*

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[4] *See, e.g., Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; *A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. of the Judiciary*, 97th Cong., 2d Sess. 111 (1982); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

the Subcomm. on Juvenile Justice of the Comm. on the Judiciary, 97th Cong., 2d Sess. 111 (1982) (statement of Robert Pitler). He reiterated this point several times during his testimony, emphasizing that excluding "mere nudity" from the statute helped insure its constitutional application. *Id.* at 115-16.

Thus, while Congress expressly rejected the overly-broad nudity requirement in favor of a narrower standard, at no time did it "repudiate[] its earlier intention to confine the statute's coverage to nude exhibitions" as the Third Circuit found. *Knox II* at PA 36. That mistaken interpretation results in the broad prohibition that Congress rejected, and endangers creators, publishers, distributors and possessors of valuable mainstream works of art and literature that are in no way sexually exploitative. The United States has confirmed this interpretation of the legislative history by concluding, along with the *amici*, that at a minimum, nudity or visible depictions of the genitals or pubic area must be present to qualify as an "exhibition" under 18 U.S.C. § 2256(2)(E). (USBr 10).

C. Congress' Intent is Presumptively Consistent With the Child Pornography Laws of the Fifty States.

The Third Circuit's unconventional construction of 18 U.S.C. § 2256(2)(E) would criminalize depictions that *no* state has criminalized. It appears that no state criminalizes an "exhibition" when the genitals or pubic area is fully covered by clothing. There are state statutes which, like the federal law, prohibit lewd or lascivious exhibitions of the genitals but, in no reported case has this language ever been interpreted to criminalize an "exhibition" in which clothing conceals the genitals or pubic area. Although to *amici*'s knowledge no court has ever expressly decided the question[5] — presumably because no state prosecutor has urged the extreme

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[5] Contrary to the argument in the court below of *amici* National Law Center for Children and Families, *People v. Walcher*, 162 Ill. Ct. App. 3d 455, 515 N.E. 2d 319 (4th Dist. 1987), involved numerous depictions in which the genitals were visible or exposed. *Id.* at 461, 515 N.E. 2d at 323.

construction adopted by the Third Circuit — courts in two such states have suggested that actual exposure of the body parts is an essential element of their exhibition.[6]

The federal government's interest in protecting children from sexual exploitation is no stronger — or different in any pertinent respect — from that of the states. The fact that no state has criminalized the type of depictions at issue here is strong support for the Court to conclude that Congress also did not consider the genitals or pubic area to be exhibited when concealed from view. Accordingly, the judicial branch should not construe the statute in a way that would be inconsistent with the plain and dictionary meanings of the statutory terms, and inconsistent with the common understanding of those terms as reflected in state laws throughout the country.

II. WERE THIS COURT TO AFFIRM THE THIRD CIRCUIT'S "EXPANSIVE" READING, IT WOULD CREATE PROBLEMS OF CONSTITUTIONAL DIMENSIONS.

A. Criminalizing Non-nude Depictions Unconstitutionally Expands the Definition of Child Pornography Beyond That Authorized by *Ferber*.

This Court has permitted criminalization of non-obscene depictions of children only within narrow, judicially-established parameters. *See New York v. Ferber*, 458 U.S. 747, 764-767 (1982). To pass constitutional muster, legislation proscribing non-obscene sexually explicit depictions of children must (1) expressly define the conduct to be prohibited by applicable law as written or authoritatively construed, (2) "be limited to works that *visually* depict 'sexual conduct' by children below a specified age," (3)

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[6] *See People v. Wallace*, 11 Cal. App. 4th 568, 14 Cal. Rptr. 2d 67, 75 (5th Dist. 1992); *State v. Petrone*, 468 N.W.2d 676, 687 (Wis. 1991), *cert. denied*, 112 S. Ct. 339 (1991).

suitably limit and describe the sexual conduct proscribed and (4) impose an "element of scienter on the part of the defendant."[7] *Id.* at 764-65 (emphasis added). Accordingly, "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain[] First Amen[illegible]t protection." *Id.* at 765.

Specific and objective standards are required so that businesspersons, such as *amici*'s members and *amici*, can objectively determine whether visual images that they produce, distribute, receive or possess could be deemed unlawful under the statute. By contrast, the standard adopted by the Third Circuit requires a subjective exploration of someone's intent and the subjective effect on the observer. *Knox II* at PA 40. That inquiry patently falls short of *Ferber's* requirements of specificity and objective inquiry, and imposes a constitutionally unacceptable burden on *amici* and their members.

The Third Circuit's previous analysis violates *Ferber's* restrictions in two distinct ways. First, by eliminating the requirement of nudity, the court blurred the definition of statutorily-defined conduct and expanded the category beyond depictions of "sexually explicit conduct" as set forth in the statute. To criminalize the depictions at issue in this case would effectively nullify the *Ferber* requirement that categories of sexual conduct "be suitably limited and described." 458 U.S. at 764-65.

Second, by focusing on lasciviousness as the "limiting principle" in the phrase "lascivious exhibition of the genitals or pubic area," the court below transformed "lasciviousness" to a "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer." *Knox I* at 823; *Knox II* at PA 40. If lasciviousness can only be determined by an inquiry into the intent behind and the projected reaction to a particular work,

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[7] The United States Supreme Court also requires that laws regulating obscenity specifically define and describe the sexual conduct that is prohibited. *Miller v. California*, 413 U.S. 15, 24 (1973).

there is no objective structure available to a person reviewing depictions of minors to determine whether those depictions could be deemed to violate the statute. This subjective standard, when coupled with the deletion of the nudity component, leaves producers and distributors of visual materials involving minors bereft of any objective guidelines to protect themselves, and imposes on mainstream businesses the virtually insurmountable burden of scrutinizing the communicative intent and potential impact on unknown viewers of innumerable items in their inventory.

As long as there is an objective requirement -- *i.e.*, the requirement that nude exhibition of the genitals or pubic area be present -- the inherent ambiguity and subjectivity of the concept of "lasciviousness," although still troublesome, at least does not leave producers, distributors and authors totally at sea in predicting what might be punishable. The adoption of a totally subjective test would have a serious impact on the publishing, producing and library communities. Publishers, producers, retailers and librarians, faced with the prospect of child pornography prosecutions limited only by a subjective test of lasciviousness, would have only one rational response: self-censorship.

The test adopted by the court below permits criminal punishment based on a work's potential impact on a particular, and perhaps a particularly susceptible, viewer.[8] If the requirement of nudity is removed and is replaced with an inquiry into subjective intent and impact, a wide range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, clothing catalogs and even family pictures — could fall within the class of child sexual exploitation and thus be criminal. The producers and distributors of those works would be unable to predict when they are in compliance with

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[8] This is a step backward to the now discredited rule of *Regina v. Hicklin*, L.R., 3 Q.B. 360 (1868). *See Roth v. United States*, 354 U.S. 476, 488-89 (1957); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184-85 (S.D.N.Y. 1933), *aff'd sub. nom United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

the law. No justification compels the Court to make that radical departure from established standards.

The apparent concern of the court below that the videos in question were intended to arouse pedophiles is understandable, but cannot justify a radical rewriting of the child pornography law. However reprehensible society may consider individuals who are aroused by images of minors, the law cannot, consistent with the First Amendment, outlaw all images that a pedophile might find arousing. Stretching laws designed to prohibit sexual abuse through pornography to encompass any image that might be considered lascivious by a pedophile would unconstitutionally chill a broad range of valuable protected speech without any likely impact on actual child abuse.

B. As Defined by the Third Circuit, 18 U.S.C. § 2256 is Vague, Overbroad and Could Criminalize Legitimate Materials.

The erroneous interpretation of 18 U.S.C. § 2256 by the court below raises overbreadth and vagueness problems of constitutional dimensions. By contrast, the narrower interpretation advanced here, rooted in established principles of statutory construction, the legislative history, and prior judicial holdings, would avoid such constitutional concerns.

1. The Third Circuit's Decision Creates the Risk of Real and Substantial Overbreadth.

"The specific rationale of overbreadth scrutiny rests on a recognition that the actual application of overbroad laws is not their only vice. Rather, the doctrine emphasizes the need to eliminate an overbroad law's deterrent impact — or chilling effect — on protected primary activity (*i.e.*, freedom of expression)." Note, *The Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 853 (1970). *See also Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

This Court has recognized that a broad reading of the "lascivious exhibition" language could render the statute constitutionally overbroad. In *Ferber*, the Court suggested that "an expansive construction to the proscription on 'lewd exhibition[s] of the genitals,'" statutory language nearly identical to that at issue here, could "widen the possibly invalid reach of the statute." 458 U.S. at 773. By broadly construing "lascivious exhibitions" to encompass clothed depictions lacking any sexual conduct, the court below has done precisely what this Court warned against in *Ferber*.

That expansive interpretation opens the door to unconstitutional prosecutions. *See Osborne v. Ohio*, 495 U.S. 103, 112-16 (1990). This construction implicates federal prosecution of countless examples of visual materials that creators, producers, distributors and purchasers would never expect to be criminally proscribed, which Congress did not intend to criminalize, and the regulation of which is constitutionally impermissible. Home videos, music videos (which often feature close-ups of portions of the bodies of gyrating dancers), art photographs, television (including teenage dance shows and cheerleading contests, which again often feature close-ups), exercise videos (which oftentimes could be considered to focus on the clothed genital or pubic areas of the athletes), advertisements and films, including home videos, would be suspect.[9] Even advertisements for athletic wear or suntan lotion, which include youngsters, could be criminalized under the Third Circuit's construction. Artists could no longer safely use clothed minors as models, as many of the world's renowned artists have done. *See Massachusetts v. Oakes*, 491 U.S. 576, 593 (1989) (Brennan, J., dissenting).

Under the lower court's interpretation, any of those works could be deemed criminal to possess or sell, even though they included neither sexual conduct nor nudity. The breadth and scope

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[9] The notion that home videos could be subject to prosecution is hardly far-fetched. Mr. Knox's prosecution was based in part on a videotape compiled by Mr. Knox from purchased videos. *See Knox I*, at 817.

of the Third Circuit's expansive interpretation undoubtedly will have an unconstitutional chilling effect on *amici* and their members, and the statute should be construed to avoid such substantial overbreadth.

2. The Court's Erroneous Interpretation is Impermissibly Vague.

The vagueness inherent in the interpretation of the court below poses insurmountable problems for media *amici*'s members and other creators, producers and distributors of mainstream visual materials. When First Amendment rights are at issue, this Court has refused to tolerate the type of vagueness and overbreadth problems presented by the interpretation of the Third Circuit:

> The objectionable quality of vagueness and overbreadth . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-33 (1963) (citation omitted). By requiring a subjective inquiry into whether materials possibly could be deemed to appeal to the lascivious interest of the intended audience as the sole limiting principle of the statute's scope, *Knox* II at PA 40, the court below has invoked a standard that eludes definitive interpretation and that necessarily will be subject to disparate, variable and selective interpretation. Such ambiguity must be, and can be, avoided by the straightforward application of rules of statutory construction which yield the generally

acknowledged requirement of nudity, plus something more — lasciviousness.

The lower court's reading of the statute is vague, impossible to apply, and fails to draw the line between the allowable and forbidden with any precision. A standard adopting a subjective inquiry leaves wholesalers, distributors, bookstores, libraries and video stores with the impossible burden of guessing the projected effect on a recipient. The difficulty of complying would be compounded by the looming specter of a criminal child pornography indictment and conviction. The Court need not and should not adopt a broad construction that raises grave constitutional concerns when an alternative construction is available, particularly when, as here, that narrower construction is supported by the statutory language, the statute's legislative history and prior judicial holdings.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to grant certiorari in this case.

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